UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

In re:

BURNETT LEE GUNN,

Debtor.
_____/

Case No.: 04-23331-BKC-RBR
Chapter 7

SONEET R. KAPILA, TRUSTEE,

Plaintiff,

v.

BURNETT LEE GUNN, PHILLIP J. HATT and INDYMAC BANK, FSB,

Defendants,
_____/

Adversary Proceeding No.: 04-2225-BKC-RBR-A

ORDER DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

THIS CAUSE came before the Court on the Motion of Plaintiff, Soneet R. Kapila for Partial Summary Judgment pursuant to Rule 56, Fed. R.Civ. P. and Rule 7056, F.R.B.P. Upon due consideration, Plaintiff's Motion is hereby denied.

Standard on Motion for Partial Summary Judgment

Under Rule 56(c), Fed.R.Civ.P., which is made applicable to in this proceeding by Rule 7056, Fed.R.Bankr.P., summary judgment is appropriate if there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The evidence and any inferences to be drawn from it must be viewed in the light most favorable to the non-moving party. *See Celotex v. Catrett*, 477 U.S. 317 (1986) and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). There is no genuine issue if the record taken as a whole does not lead a rational trier of fact

to find for the non-movant. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Co.*, 475 U.S. 574 (1986).

Factual Background

On August 8, 2003, Philip J. Hatt closed on the purchase of the property located at 4524 Madison Street, Hollywood, FL, paid consideration for the property, and took title by way of a warranty deed from Debtor Burnett Gunn. Hatt executed a purchase money mortgage in favor of IndyMac Bank, F.S.B. in exchange for a loan in the amount of $167,200. Following his purchase of the property, Hatt made improvements to the property.

At the time of the conveyance from Gunn to Hatt, the property was in foreclosure on both a first and second mortgage executed by Gunn. Foreclosure judgments had been entered on both mortgages and foreclosure sales were scheduled on August 11, 2003 and on September 15, 2003.

On its face, the deed to Hatt is missing the signature of one witness. Hatt has submitted unrefuted evidence that there was more than one witness to the execution of the deed, but through inadvertent error, the deed was signed by only one witness prior to recording. The witnesses to the execution of the deed are willing to subscribe their names if the Court so allows. The Trustee objects to the correction of the missing witness signature post petition and seeks to set aide the conveyance to Hatt and invalidate the mortgage held by IndyMac Bank.

Discussion

The Trustee's first argument is that the deed into Hatt and the mortgage held by IndyMac Bank, F.S.B. are void under section 689.01, Fla. Stat. because the deed fails to reflect the signature of a second witness. The Trustee asserts that the absence of a second subscribing witness on the face

of the deed renders the deed ineffective.

Section 689.01, Fla. Stat. provides:

> No estate or interest of freehold, or for a term of more than 1 year or any uncertain interest of, in or out of any messuages, lands, tenements or hereditaments shall be created, made, granted, transferred or released in any other manner than by instrument in writing, signed in the presence of two subscribing witnesses by the party creating, making, granting, conveying, transferring or releasing such estate, interest or term of more than 1 year...

By its terms, the statute requires that a conveyance of land be effected: 1) by way of a writing; 2) executed by the grantor; 3) in the presence of two witnesses. Florida case law interpreting the statute reveals that while two witnesses to the execution of a deed are in fact necessary to its validity, the failure of a witness to affix his or her signature to the deed at the time of the initial execution of the deed does not make the conveyance ineffective. *See Medina v. Orange County,* 147 So. 2d 556 (Fla. 2d DCA 1962); *see also Sweat v. Yates*, 463 So. 2d 306 (Fla. 1st DCA 1985). The operative fact is that two (2) witnesses were present when the deed is signed. While the fact that only one witness' signature appears on a deed may indicate that only one witness was present, if in fact it can be shown that more than one witness was present but failed to affix his signature, the deed will not be rendered ineffective.

> Although the provisions of Section 689.01, Fla. Stat., require that such an instrument be executed in the presence of two subscribing witnesses, the statute does not require that such witnesses shall subscribe in the presence of the grantors, or in the presence of each other. Likewise, the statute does not by express terms require that subscribing witnesses shall sign the document before delivery thereof is accomplished.

See Medina, 147 So. 2d at 557.

Under Florida law, the defect can be corrected by having the witness affix his or her signature at a later time or by way of reformation. *See Medina, supra; see also Gill v. Livingston*, 29 So. 2d 631 (Fla. 1947).[1]

In the present case, the deed from Burnett Gunn to Philip J. Hatt was executed in the presence of four people: Raymond Sanchez, Sarah Wojton, Jamie Grimes, and Maribel Tallon. In their affidavits, Raymond Sanchez and Sarah Wojton explain that the failure to subscribe their names as witnesses was an inadvertent oversight. In reliance on the conveyance of the property from Burnett Gunn to Hatt, Hatt executed a purchase money mortgage in favor IndyMac Bank, FSB and is personally obligated to repay the loan in the amount of $167,200. Hatt paid for the property in consideration for, and with the expectation that he was receiving, good title. He also made improvements to the property thereafter in reliance on his title. Reliance by the grantee on the validity of the conveyance is one of the justifications given by Florida courts for upholding the validity of a deed with a missing witness' signature. *See* M*edina*, 147 So. 2d at 557. *See also Gill v. Livingston*, *citing to Steen v. Scott*, 198 So. 489 (Fla. 1940) and authorities cited therein.

The Trustee cites to *American General Home Equity, Inc. v. Countrywide Home Loans, Inc.*, 769 So. 2d 508 (Fla. 5th DCA 2000) and *Walker v. City of Jacksonville*, 360 So. 2d 52 (Fla. 1st DCA 1978) in support of his position that the deed is invalid. Neither case is persuasive on the undisputed

[1]Florida also has a curative statute which confirms the validity of a deed with missing witness signatures five years after its recordation. *See* §95.231, Fla. Stat. Although the statute is not applicable here because the five year period has not elapsed, the statute reflects a policy under Florida law to avoid forfeiture.

facts before this Court because the deed to Hatt was in fact executed in the presence of several witnesses.

American General involved a priority dispute between two competing lenders, each of whom received mortgages from different purported owners. One mortgagor, Yvette Pack, received a quit claim deed for the subject property which contained the signature of the grantor, a witness and a notary. In opposition to the summary judgment motion filed by Countrywide, American General filed an affidavit signed by the notary stating that he saw the grantor sign the deed. However, the affidavit did not state that the notary also signed the deed in his capacity as a witness. The court noted: "while a notary may also serve as a witness, the mere existence of an acknowledgment on an instrument raises no presumption that the notary was a witness. Nor is the mere existence of the acknowledgment proof that the notary was a witness."

The *American General* court distinguished *Medina* on the basis that the notary in *Medina* actually signed the deed as a witness after originally notarizing the deed.[2] The *American General* court concluded that there was only one subscribing witness to the deed and it therefore held that the deed failed to convey title to Pack, making American General's interest in the property invalid. The opinion fails to discuss the issue of reliance or exchange of consideration by the grantee.

In *Walker v. City of Jacksonville*, there was no evidence of the execution of the deed in question in the presence of two witnesses. The Court concluded that in the absence of such evidence, the deed was ineffective to convey title. Unlike *Walker,* the undisputed evidence before this Court is that there were several witnesses to the execution of the deed from Gunn to Hatt.

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[2]The notary on the deed to Hatt signed both as notary and witness as well.

Consequently, the Court finds that under Florida law, as between the parties to the instrument, the deed from Gunn to Hatt is not void and said deed can be corrected by allowing the signature of a witness to be added following delivery.

However, this conclusion does not dispose of the Trustee's Motion for Partial Summary Judgment because the Trustee next argues that the case law relied upon by Hatt and IndyMac Bank involved actions by and between the parties to the conveyance, not third parties. The Trustee asserts that under 11 U.S.C. § 544(a), the strong arm clause, he has the rights and powers of a bona fide purchaser of real property from the debtor or a judicial lien creditor as of the time of the commencement of the case.[3] Although bankruptcy law confers on the Trustee BFP (Bona Fide Purchaser) or lien creditor status, state law defines who is a BFP or creditor without notice. *See In re Davis*, 109 B.R.633 (Bankr. D. Vt. 1989); *In re Miller*, 260 B.R. 158 (Bankr. D. Idaho 2001).

> [U]nder [Florida law] "subsequent purchasers and creditors acquiring subsequent liens by judgment or otherwise without notice of a prior unrecorded deed will be protected against such unrecorded conveyance, unless the party claiming thereunder can show that such subsequent purchaser or lien creditor acquired his title or lien with notice of such unrecorded conveyance; and the burden of showing such notice is upon the party claiming under such unrecorded conveyance. . . .
> An execution creditor, equally with a subsequent purchaser, is protected under the statute [Florida's recording statute] against unrecorded deeds, and, in order to deprive such judgment creditor of the protection of the recording statute, it must be shown that he had

[3]The following two arguments were raised by the Trustee at the hearing on Trustee's Motion for Partial Summary Judgment. Consequently, they were not briefed by the parties. Defendants Hatt and IndyMac Bank FSB have filed a Request for Judicial Notice of the recording of certain documents in the public records of Broward County, Florida, affecting the subject property in order to address these new arguments by the Trustee. The Court takes judicial notice of these documents pursuant to Rule 201(d), Fed.R.Evid.

> notice in some recognized way of the rights of the party claiming under the unrecorded deed *at the time of the rendition of his judgment*."

See Carolina Portland Cement Company v. Roper, 67 So. 115, 116 (Fla. 1914) *citing to Feinberg v. Stearns*, 47 So. 797 (Fla. 1908).

Therefore, Florida law treats both potential BFPs and subsequent creditors equally for purposes of determining whether they will be bound by a prior conveyance or interest. A purchaser is not a BFP (nor is a creditor entitled to priority) if he has actual, constructive or inquiry (sometimes called implied actual) notice of facts which would lead a prudent person to suspect that another person might have an interest in real property and to conduct further investigation into the facts. *See Crown General Stores, Inc. v. Ultra Meat Market, Inc.*, 843 So. 2d 287 (Fla. 3d DCA 2003) *citing to Sapp v. Warner*, 141 So. 124 (Fla. 1932), *aff'd on rehearing*, 143 So. 648 (Fla. 1932).

Assuming arguendo that the deed into Hatt is invalid under §689.01, Fla. Stat., because of the absence of a second subscribing witness, the issue before the Court is whether the Trustee was on notice, whether actual, constructive, or inquiry, of Hatt's and IndyMac Bank's interest in the property such as would defeat the Trustee's hypothetical BFP or creditor status. For the reasons set forth herein, the Court finds that the Trustee had notice of Hatt and IndyMac Bank's interest in the property as of the commencement of this case and that such notice defeats his BFP or creditor status.

The Court will address constructive and inquiry notice first. Constructive notice is notice of all claims which are revealed by the public records. *See Sapp v. Warner*. In this case, the deed into Hatt and the mortgage in favor of IndyMac were recorded in the public records of Broward County, Florida prior to the commencement of this action. Consequently, the Trustee and any

purchaser or creditor would have been on constructive notice of the recording of said documents and the interests they created.

The Trustee has not raised the argument that an improperly witnessed deed is not entitled to recordation and therefore fails to give constructive notice. Nevertheless, the Court will address this argument and finds it unpersuasive under Florida law. Under §695.03, Fla. Stat., a document creating an interest in land can be recorded as long as it is properly notarized. The Trustee does not assert that the deed to Hatt was improperly notarized. The deed was accepted by the Clerk and recorded in the public records. Following said recording, the recording of that deed would have given actual notice to anyone reviewing the public records even if it failed to give proper constructive notice. *See Lassiter v. Curtiss-Bright Co.*, 177 So. 201, 203 (Fla. 1937)(under Florida law, recording of agreement for deed which was not acknowledged gave actual notice to one who reviewed the public records even though it failed to give constructive notice because it should not have been recorded in the first instance.); *see also Harris v. Walbridge*, 488 So. 2d 881 (Fla. 1st DCA 1986)(reversing trial court which held that improperly notarized mortgage was a nullity and holding that said mortgage did provide constructive notice to a third party purchaser with no actual notice).[4] Consequently, even though Hatt's deed may have been improperly witnessed and even if

[4]Other jurisdictions follow the same rule. *See also In re Barnacle*, 623 A.2d 445 (Sup.Ct. R.I. 1993)(finding that a recorded mortgage missing signature of one of the mortgagors would give a prospective purchaser "a definite clue about an interest in the property" and would destroy a purchaser's claim that he is bona fide). *Contra In re Ryan*, 851 F.2d 502 (1st Cir. 1988), where the Court, applying Vermont law, concluded that a mortgage lacking a second subscribing witness was invalid and held that under Vermont law, it did not impart constructive notice. However, *In Re Ryan* involved only the defective mortgage and there is no discussion of any other documents of record that would have given rise to inquiry notice.

it were not effective as a conveyance, under Florida law, its recordation in the public records imparted notice of an interest in real property to one who reviewed the public records.[5] The allegations made in the Trustee's Complaint filed in this action, which include recording information for the deed and mortgage at issue, suggest that the Trustee did in fact review the public records prior to and in connection with the commencement of this action. These allegations at least raise an inference that the Trustee examined said public records, and therefore would have seen the deed and would have derived notice of the interest in Hatt.

If the Trustee did in fact review the public records, then whether Hatt's interest was a valid ownership interest is not the issue for purposes of determining the Trustee's BFP status. Even if the recorded deed was ineffective as a conveyance to Hatt under §689.01, Fla. Stat., the Court is not persuaded that under Florida law, the Trustee could simply disregard the recorded deed altogether and conclude that the property was not subject to some interest held by Hatt. Because the recorded deed put the Trustee on notice of an interest held by Hatt, the Court does not deem the Trustee a BFP or innocent creditor as to Hatt.

The Trustee argues that the alleged invalidity of the deed into Hatt also invalidates the mortgage held by IndyMac. However, the Trustee as a hypothetical purchaser on the date of the commencement of this action would have had constructive notice of the existence of the recorded mortgage executed by Hatt and held by IndyMac Bank on the subject property. The Trustee has not raised, and the Court cannot discern, a reason for disregarding the recording of the mortgage

[5] *See Medina,* where the trial court deemed the improperly witnessed deed as a dedication of roadway.

executed by Hatt and held by IndyMac Bank. There is no known defect in the mortgage, either as to its execution or recording. Consequently, as to IndyMac Bank, the Trustee had constructive notice and cannot claim BFP or innocent creditor status.

The Court will next address inquiry or implied actual notice and finds that the Trustee had such notice of Hatt's interest in the subject property.

> Implied actual notice has been defined as "notice inferred from the fact that the person had means of knowledge, which it was his duty to use and which he did not use." The principle behind this notice is "that a person has no right to shut his eyes or ears to avoid information, and then say that he has no notice; that it will not suffice the law to remain wilfully ignorant of a thing readily ascertainable by whatever party puts him on inquiry, when the means of knowledge is at hand."

Crown General Stores, 843 So. 2d at 289*, quoting Sapp,* 141 So. at 255 (citation omitted). *See Grant v. Davis (In re CJW Ltd.)*, 172 B.R. 675, 682 (Bankr. M..D. Fla. 1994)("[A]n individual relying on the public record to determine the state of title is charged with notice not only of what is in the record but with that which could be discovered through inquiries suggested by the record."); *In re Hagendorfer*, 803 F.2d 647, 649 (11th Cir. 1986)(trustee had notice of mortgage containing error in legal description. Strong arm clause does not relieve Trustee from examining public records and he "may be bound by erroneous, defective, or incomplete matters of record, the discovery of which would lead to further inquiry"); *see also First Union Nat'l Bank v. Diamond (In re Diamond),* 196 B.R. 635 (Bankr. S.D. Fla.. 1996)(mortgagee's recording of lis pendens gave notice of unrecorded mortgage and therefore lender's interest could not be avoided under strong arm clause where bona fide purchaser would not have taken title free and clear).

Even assuming arguendo that the Trustee could disregard the recorded deed into Hatt

altogether, certainly the public records revealed a series of documents affecting the title to this property which would have alerted a prudent purchaser to inquire further. These documents are:1) the recorded mortgages held by the first and second mortgagees which were executed by Gunn; 2) the lis pendens recorded by these mortgagees; 3) the foreclosure judgments entered in the actions brought by each of these lenders; 4) the mortgage held by IndyMac showing Hatt as mortgagor; 5) the orders vacating the two foreclosure judgments, dissolving the lis pendens and dismissing the foreclosure actions brought by the first and second mortgage holders; and 6) the satisfactions of the first and second mortgages recorded several months prior to the commencement of this action. These recorded documents should have caused further inquiry by the Trustee (or any purchaser or creditor) to determine who Hatt was, why he was executing a mortgage against the subject property, why this property was no longer in foreclosure; and why and how the mortgages executed by Gunn had been satisfied. Had such inquiry been made, Hatt's ownership interest would have been discovered independently of whether the deed itself afforded constructive notice.

Therefore, the Court concludes that the Trustee was on inquiry or actual implied notice of Hatt's claim to the property and is not entitled to BFP or creditor status free of Hatt's interest in the property. *See Sapp v. Warner*, 141 So. 124 (Fla. 1932)(purchasers of property were on implied actual notice not only of recorded deed from guardian, but also of unrecorded mortgages which they would have discovered by reviewing the Court file of the proceedings before the County judge approving the deed and therefore took subject to those unrecorded mortgages).

Following Hatt's purchase of the property, he made improvements to the property. Whether the Trustee was afforded actual notice of Hatt's interest in the property by virtue of these improvements would be a factual issue, which would preclude summary judgment in favor of the

Trustee in any event. The bankruptcy court in *In re Davis*, 109 B.R. 633 (Bankr. D.Vt. 1989), held that the ineffective deed coupled with the grantees' use of the property was sufficient to put the Trustee on notice and defeat his hypothetical lienor status. In *Davis,* the Trustee, pursuant to his strong arm powers, brought an adversary proceeding alleging that a deed from the debtor to a third party should be set aside as void because the deed was witnessed by the grantees and not properly acknowledged as required by Vermont law. The *Davis* Court reasoned that

> [t]he status or rights a trustee receives, in his capacity under § 544(a)(3) is subject to the effect of any constructive notice that State law deems is given by public record or by possession of one who has no interest of record. Any other interpretation would clothe a trustee with powers no purchaser could have under State law -- a result that Congress could not have intended.

Id. at 639.

ACCORDINGLY, for the foregoing reasons, it is hereby

ORDERED and ADJUDGED that the Motion of Trustee Soneet R. Kapila for Partial Summary Judgment (C.P. 33) is **DENIED**.

DONE AND ORDERED in the Southern District of Florida on this 11th of January, 2005.

RAYMOND B. RAY
UNITED STATES BANKRUPTCY JUDGE